IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JOSE TRUJILLO, on behalf of Himself and all others Similarly situated, **Plaintiffs,**	**Case No. 07-cv-4946**
	Hon. Judge Kennelly
APPLE COMPUTER, INC., a California Corporation, and AT&T MOBILITY, LLC, an Ohio Corporation, **Defendants.**	**Mag. Judge Ashman**

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT APPLE'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Plaintiff, Jose Trujillo, on behalf of himself and all others similarly situated, by and through his attorneys, LARRY D. DRURY, LTD., and in Response to Defendant Apple Computer, Inc.'s ("Apple") Motion for Summary Judgment, states as follows:

INTRODUCTION

For Apple to be right, the world must be wrong. The position assumed by Apple in its Motion for Summary Judgment requires this Court to believe that Plaintiff, numerous consumers, consumer advocacy groups, and dozens of newspapers and media outlets were unable to locate on-line that which Apple now claims existed since it first launched its iPhone for sale: the terms of the iPhone battery replacement program. *See* Group Exhibit A.

Further, Apple's "too little, too late" disclosure, if even it did exist, was by design insufficient and misleading where Apple purposefully hid it on web pages that only Apple could know existed, and directed consumers seeking that information to web pages that did not contain the material terms of its battery replacement program. In fact, Apple admits that the only two websites to which Apple directed its consumers "for more information related to the iPhone battery replacement program" were (and remain) completely devoid of any of the terms of the battery replacement program, i.e., cost, shipping, etc., that would be material to consumers.

Simply stated, too many questions of material fact remain at issue for Apple to prevail on its Motion for Summary Judgment at this earliest of stages in the litigation. Among the many facts that remain in dispute are:

1. Whether or not Apple omitted and/or concealed the terms of its battery replacement program prior to releasing its iPhone for sale;
2. Whether or not Apple purposefully misguided consumers away from websites that it alleges contained material terms of its battery replacement program and toward websites that failed to disclose said terms;
3. Whether or not Apple's claimed disclosure of the terms of its battery replacement program was sufficient, if even such a disclosure did exist;

4. Whether or not Apple's spokesperson, Jennifer Hakes, publicly admitted that Apple did not post the terms of its battery replacement program until **after** the iPhone was released for sale.

The above questions of fact, by no means an exhaustive list of the assertions that Defendant advances in its Motion and that Plaintiff disputes, strike at the heart of this case. Defendant has failed to resolve even one with certainty, let alone enough to make judgment in its favor appropriate at this juncture. For the foregoing reasons, Defendant's Motion for Summary Judgment must be denied and this case allowed to proceed.

STANDARD OF REVIEW

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(c). In determining whether a genuine issue of material fact exists, the Court must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in that party's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, (1986). Summary judgment is among the most extreme forms of relief that a court can grant a party, and is a drastic means of resolving litigation which should only be allowed when the right of the moving party is clear and free from doubt. *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill.App.3d 45, 50 (1999).

Based on this standard and the uphill battle a movant faces in seeking summary judgment, Apple's Motion should be denied because as Plaintiff will show below, Apple fails to resolve material questions of fact.

ARGUMENT

I. ILLINOIS CONSUMER FRAUD ACT (COUNT I)

Defendant argues that Plaintiff cannot meet its burden in stating a claim under the Illinois Consumer Fraud Act ("CFA"). A claim under CFA requires facts that show (1) a deceptive act or unfair practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) the deception occurred in the course of conduct involving trade or commerce; and (4) actual damage to the plaintiff (5) proximately caused by the deception. *See* 815 ILCS 505/2, *Connick v. Suzuki*, 174 Ill.2d 482, 489 (1996). Defendant's Motion for Summary Judgment relies wholly on their proposition that Defendant timely disclosed the information Plaintiff alleges Defendant omitted and/or concealed, namely the material terms of its Battery Replacement Program. While Defendant contends it made ample disclosure of these terms, its own internal correspondence via email, its interaction with members of the press, and its intentional and deliberate actions in guiding consumers away from the information if even it did exist, create questions of material fact and call into question the truthfulness of Defendant's assertions. Further, although Defendant alleges that Plaintiff has suffered no damages, Plaintiff has suffered diminution of value in his iPhone, the cost of purchase of his iPhone, interest, and decreased resale value of his iPhone, among other damages, related to Defendant's Battery Replacement Program. For the following reasons, Defendant's Motion for Summary Judgment as to Plaintiff's claim for violation of the Illinois Consumer Fraud Act should be denied.

A. WHETHER OR NOT APPLE INTENTIONALLY CONCEALED OR OMITTED THE TERMS OF ITS BATTERY REPLACEMENT PROGRAM PRIOR TO RELEASING THE IPHONE FOR SALE, PROXIMATELY CAUSING PLAINTIFF TO SUFFER DAMAGES, IS A MATERIAL QUESTION OF FACT THAT REMAINS IN DISPUTE

1. Defendant Omitted The Material Terms of its Battery Replacement Program From Those Websites to Which It Directed Consumers Who Were Seeking Information About The Battery Replacement Program

Defendant alleges that it disclosed the terms of the iPhone battery replacement program on-line prior to releasing the iPhone for sale. Plaintiff, and many others, claim that Apple did not. *See* Group Exhibit A. Defendant attached an affidavit from employees of its IT Department claiming to have timely posted the terms. In response, Plaintiff need only point to Defendant's response to Plaintiff's Requests to Admit, attached hereto as Exhibit B. In it, Defendant's admissions demonstrate that its disclosures, if even they did exist, were purposefully designed to be insufficient, misleading, and worst of all, hidden from consumers.

When a consumer purchases an iPhone from Apple, he receives a packaging box containing the iPhone, phone charger, user manual, and earphones. At first glance, Defendant appears to direct the Plaintiff to the webpages where he may find the relevant battery replacement program information. Curiously though, neither web page to which the Defendant directs the consumer contains the information that would be material to the consumer, i.e., price, shipping, terms, etc.

For instance, the packaging box contains a script of information on its back. *See* copy of same, attached hereto as Ex. C. Within the script is the following language:

> “”Battery has limited recharge cycles and may eventually need to be replaced by Apple service provider...See www.apple.com/batteries.”

Id. Defendant creates the implication and appearance that one need do only that which Apple directs: go to www.apple.com/batteries for the terms of its battery replacement program. However, as Defendant admits in its Response to Plaintiff’s Request to Admit #14 attached hereto in Exhibit B, that the web page, attached hereto as Exhibit D, makes no mention of the cost of replacing the iPhone battery, the cost of shipping and handling related to same, the terms of replacement or the consequences of replacement, i.e., data deletion, the time it takes to replace the battery during which a user will be without a phone or required to ‘rent’ an iPhone from Apple for an additional fee, and the cost of the ‘rental’ program, etc., (hereinafter referred to as “material terms”). Apple conveniently left these material terms off of the page it directed consumers to visit because otherwise consumers of the iPhone, like Plaintiff, would have discovered that the battery replacement program costs would be over 20% of the cost of the phone each and every time the battery requires replacement, not to mention the high cost of renting an iPhone while Apple services the battery.

Further, if one were to click the link titled “About iPhone Batteries” located on the www.apple.com/batteries webpage he would be directed to www.apple.com/batteries/iphone.html, a copy of which is attached hereto as Exhibit E. Again, as Defendant admits, this web page also failed to include any of the material terms of the Defendant’s BRP to which consumers would be subjected. *See* Defendant’s Response to Plaintiff’s Request to Admit # 16, attached hereto as Exhibit B.

The only other place to which Plaintiff is directed by the Defendant for information related to the battery replacement program is found on page 4 of the iPhone Product Information Guide[1] (“hereinafter “Guide”). *See* p.4 of Guide, attached hereto as

[1] It should be noted that at the point a consumer is able to read the Guide he or she has already purchased the iPhone and opened the box, subjecting the consumer to damages, including but not limited to a 10%

Ex. F. This directs Plaintiff to www.apple.com/batteries (already discussed above), and www.apple.com/support/iphone/service. However, as Defendant again admits in Response to Plaintiff's Request to Admit #15 attached hereto as Exhibit B, material terms, i.e., price, shipping costs, terms, etc., did not, and still do not, exist on that webpage.

For the court to adopt Apple's argument that it "disclosed" the terms of the BRP, the court must also then adopt Apple's apparent definition of the word "disclosure": placing the information on a website which no consumer would know exists while steering consumers toward other websites on which the information has been purposefully omitted and/or does not exist. This begs the question: how can one have disclosed something by purposefully hiding it? They cannot.

2. Defendant Did Not Disclose the Material Terms of Its Battery Replacement Program, And In Fact Did All It Could To Prevent Disclosure of The Terms, Prior to Releasing The iPhone For Sale to The Public

Despite its claims to the contrary, Defendant did not disclose the terms of its Battery Replacement Program to the public prior to releasing its iPhone for sale. This is shown, among other things, by the Foundation for Taxpayer & Consumer Rights letter of June 29, 2007 (attached hereto as Exhibit G) in which the Foundation's President stated that they had:

> "carefully examined all iPhone information available online from your firms' (Apple & AT&T) web sites. As of this writing, neither Apple nor AT&T has posted any information regarding the policy with respect to battery replacement. We can only assume that Apple and/or AT&T intend to provide a replacement battery at no charge for the actual life of the phone. Moreover….." *See* ¶2 of p.2 of Exhibit H.

The Foundation's letter should come as no surprise[2] as Defendant, on numerous occasions, took a "by any means necessary" approach to prevent disclosure of these

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restocking fee should they wish to return the iPhone. Nonetheless, as Plaintiff admits above, the Guide failed to disclose the material terms of the BRP and failed to direct consumers to any website that contained those terms. In fact, it intentionally directed consumers to pages that did not contain the material terms of the BRP.

[2] However, the existence of this letter should surprise the Defendant because in its Response to Interrogatories #6 and #17 of Plaintiff's First Set of Interrogatories to Defendant, Defendant denies that it ever received any inquiry or complaint from any consumer advocacy group related to its battery replacement program. Clearly, this was untrue. *See* Defendant's Response to Interrogatories #6 and #17 of Plaintiff's First Set of Interrogatories, attached hereto as Ex. H.

terms. For instance, when Daniel Frommer, a technology reporter with Forbes Magazine, inquired on June 13, 2007 of Apple Spokespersons Jennifer Bowcock and Jennifer Hakes regarding the iPhone's battery replacement program, Bowcock and Hakes took pride in the fact they did not answer his questions. In fact, in response to Bowcocks email to Hakes in which she informs Hakes that Frommer "was ok with not actually being able to answer his questions", Hakes wrote: "Fabulous **;)**". *See* Frommer,Bowcock,Hakes Email, attached hereto as Ex. I. This is similar to Defendant's response on June 28, 2008 to an inquiry by Joe Nocera, business journalist for the New York Times, regarding the battery replacement program. According to Dianne Rambke, an Apple employee, Nocera had called to inquire about the battery replacement program but received no response. Specifically, Rambke wrote to Apple spokesperson Jennifer Hakes that Nocera:

> "wants to be clear you are not going to answer the question on how you're going to replace the battery. **It's baffling to him that this is not a question you would want to answer in the interest of consumers.** He's just trying one last time just to make sure that he's right that it's not a question you want to answer. And even if you don't want to answer he's hoping you'll at least call and say you're not going to answer the question." *See* Rambke, Hakes Email, attached hereto as Ex. J. (emphasis added).

Additionally, on June 28, 2007 Apple spokesperson Hakes indicated in an email that in responding to USA Today business reporter Michelle Kessler's question regarding the battery replacement program, she had no intention of answering her question but "was planning to get more details on what she wanted, not offer comment ☺". *See* Hakes, Neumayr Email, attached hereto as Ex. K.

In addition to countless press inquiries[3], Defendant's own internal communications raise the question of whether its website even contained the link (www.apple.com/support/iphone/service/battery) at which Defendant claims the relevant information existed, i.e., pricing, shipping costs, terms, rental cost, etc., related to the battery replacement program. In an August 6, 2007 email from Apple employee Matthew Willcott to Lance Kunnath, responsible for AppleCare web content and design for the iPhone, Willcott states that he "did not see this link when [he] looked at the page on **July 2 [2007]**," referring to www.apple.com/support/iphone/service/battery. *See* Willcott,Kunnath Email, attached hereto as Ex. L. This is the same link which Lance Kunnath, in ¶3 of his *Declaration in Support of Apple's Motion for Summary Judgment*, attached hereto as Ex. M, claims contained the details of the battery replacement program on June 29, 2007. Notably, Willcott also mentions in that same email that "**we don't have the battery replacement logic in place right now, and Trish told me that it would not be needed until iPhones start to fall out of warranty (11 months from now).**" *See* Willcott,Kunnath Email, attached hereto as Ex. L. (emphasis added). Again, this email was drafted on August 6, 2007, nearly forty days after Defendant purports to have already posted the material terms of its Battery Replacement Program on its website.

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[3] Again, as with the letter from the Foundation for Taxpayer & Consumer Rights, the Defendant denied ever having received any inquiries from the media or press in its Response to Interrogatories #6 and #17 of Plaintiff's First Set of Interrogatories. Clearly, as Group Exhibit A and Exhibits I-L demonstrate, this was untrue. *See* Defendant's Response to Interrogatories #6 and #17 of Plaintiff's First Set of Interrogatories, attached hereto as Ex. H, as well as Group Exhibit A and Exhibits I-L hereto.

3. Defendant's Omission and/or Concealment of The Material Terms of Its Battery Replacement Program was Intentional

Defendant contends that its "disclosures", if even they can be called that, negate any finding of intent. However, Defendant's email correspondence abounds in statements from Apple employees showing that it was their intent to not answer inquiries regarding its Battery Replacement Program and to avoid disclosure of the terms and costs of its Battery Replacement Program to the press and consumers, even where such disclosure would have been in the interest of consumers. In the Hakes-to-Bowcock email, Hakes indicated with a wink of the eye, i.e., **;)**, that it was "[f]abulous" that Bowcock didn't answer an inquiry regarding the Battery Replacement Program. *See* Frommer,Bowcock,Hakes Email, attached hereto as Ex. J. In a second email, punctuated with a smiley face, i.e., ☺, Hakes indicated she had no intention to "offer comment" in response to another inquiry on the Battery Replacement Program. *See* Hakes, Neumayr Email, attached hereto as Ex. L. Further, the deliberate actions of Defendant in directing Plaintiff to two websites, www.apple.com/batteries and www.apple.com/support/iphone/service, where the material terms of the Battery Replacement Program did **not** exist, rather than to the website where they allege the disclosure was made, shows intent to deceive. Defendant's argument to the contrary, especially when based on its feeble argument that it made appropriate and timely disclosures, must fail.

4. Plaintiff Has Suffered Actual Damages As a Result of Defendant's Omissions and Concealments

Where Plaintiff and other consumers purchased their iPhone from Defendant while Defendant was concealing the cost of replacing its battery, which amounts to over 20% of the purchase price of the phone, they have suffered damages of diminution in value of their iPhone. Diminution in value is actual damages. In *Connick v. Suzuki*, the Illinois Supreme Court reinstated a consumer fraud claim of which the damages portion alleged only diminution in value. 174 Ill.2d 482, 489 (1996). The plaintiffs in *Connick* claimed to be injured by the reduction in resale value, as well as the purchase price, of certain Suzuki vehicles vulnerable to an increased risk of rollover. *Id.* The court's reinstatement of the claim illustrates that loss of value constitutes a cognizable injury sufficient to support a fraud claim. *Id.* Further, the Second Circuit, after observing that "injury in fact" is a low threshold, and that injury can be as minor as the anxiety of future harm, recently vacated a dismissal order in *Ross v. Bank of America, N.A*, 524 F.3d 217 (C.A.2, Apr. 25, 2008). That court found that diminished value of the Plaintiff's credit cards was an injury in fact. *Id.*

Defendant relies on the ruling in *Kelly v. Sears Roebuck Co.*. 308 Ill.App.3d 633 (1999). In *Kelly*, the plaintiff claimed that Sears sold him a car battery as "new" which **might have** been used, and therefore **might have** been of lesser quality than a new battery. *Kelly,* 308 Ill.App.3d at 642. The plaintiff could not, however, establish that he had in fact been sold a used battery. *Id.* In effect, allowing the *Kelly* plaintiff's claim based merely on a question as to whether his battery was used would have dictated that damages could be obtained by every purchaser of a Sears car battery during the relevant time period, without ascertaining the existence of any defect. In doing so, the *Kelly* court distinguished its ruling from *Connick* by noting that *Connick* involved diminution in resale value or diminished value from a known defect and thus "illustrated easily cognizable actual injuries and damages, while any injury in the [Kelly] case is speculative at best." 308 Ill.App.3d at 644 (1999). The case at bar is more similar to the *Connick* case, and is easily distinguishable from the *Kelly* case.

Unlike the *Kelly* plaintiff who could not establish that his battery was used and thus subject to failure, there is no dispute in the case at bar that Plaintiff's phone is subject to the costly terms of Defendant's Battery Replacement Program. These costs, again over 20% of the purchase price of the iPhone, diminish the resale value of

Plaintiff's phone. Since Plaintiff's phone is subject to the terms of Defendant's battery replacement program, and said program increases the cost of Plaintiff's phone thus resulting in a diminution of resale value, the issue of actual damages is a question of material fact that remains in dispute.

II. FRAUDULENT CONCEALMENT (COUNTII)

Defendant's Motion for Summary Judgment as to Plaintiff's claim for fraudulent concealment (Count II) is based, in large part, on the same argument it made with respect to Count I above. Specifically, Defendant alleges that Plaintiff cannot meet his burden of proof because it made adequate and timely disclosures, and nonetheless had no duty to disclose the terms of its costly BRP. In response, Plaintiff refers the Court to his response as stated above regarding the issue of disclosure, adequacy and timeliness of disclosure, Defendant's intention to deceive, etc. Further, Plaintiff argues that the following additional facts require denial of Defendant's Motion as to this Count II.

A. PLAINTIFF COULD NOT HAVE DISCOVERED THE TRUTH THROUGH A REASONABLE INQUIRY OR INSPECTION WHERE DEFENDANT DID NOT ADEQUATELY DISCLOSE, AND IN FACT INTENTIONALLY CONCEALED, THE TERMS OF ITS BRP.

As Plaintiff argues above, and as Group Exhibit A, and Exhibits G and I-L hereto demonstrate, Defendant intentionally concealed the terms of its battery replacement program by not posting those terms to its website, or including those terms in any manual, advertisement, or other document provided to Plaintiff prior to his purchase of the iPhone. However, assuming arguendo that Defendant did post the terms of its BRP to some hidden website, Defendant nonetheless directed Plaintiff away from the hidden websites and to websites that did not contain the material terms of the costly BRP. This is shown, as argued above, where Defendant was directing Plaintiff and consumers to two websites, www.apple.com/batteries and www.apple.com/support/iphone/service, where the price, terms, and conditions of the Battery Replacement Program did **not** exist, rather than to the hidden website where Defendant alleges the disclosure was made. Nonetheless, Defendant now advances the frivolous argument that Plaintiff, through some investigation of his own, could have discovered the terms of the Defendant's BRP even though countless media, reporters, journalists, and in fact, employees of the Defendant, could not find it. *See Group Exhibit A and Exhibits G, I-L*. In support of its claim that Plaintiff cannot establish that he could not have discovered the truth through his own inquiry or inspection, Defendant cites to the case of *Davis v. G.N. Mortg. Corp.* 396 F.3d 869. However, *Davis* is easily distinguishable. In *Davis*, the plaintiff brought suit for fraud based upon his allegation that the defendant-lender verbally represented at a real estate closing that his loan documents did not contain a prepayment penalty when in fact they did. According to the court, the Davis' had three days prior to the closing to review the loan documents themselves, which did in fact contain the prepayment penalty disclosure. Further, the court found that the Davis' had another two hours during the closing and execution of the loan documents to discover the prepayment penalty disclosure. In short, the court granted summary judgment for the defendant in *Davis* because the Davis' were afforded the opportunity of knowing the truth (and did not avail themselves of same) where they had ample opportunity to read materials disclosing the allegedly concealed information.

Here, the facts could not be more different. Unlike *Davis,* Plaintiff here was never provided with the terms of the costly BRP, but was instead directed to websites that failed to contain the relevant and material terms, i.e., cost, etc. Unlike *Davis*, Plaintiff here had no documents to review other than those provided to him **with his purchase** after he had already paid for the iPhone and subjected himself to the Defendant's usurious restocking fee – and, as argued at length above, even those documents failed to include the relevant terms of Defendant's BRP, and failed to direct Plaintiff to any website upon which Defendant alleges to have disclosed the BRP terms. Clearly, Plaintiff had no opportunity to discover that which Defendant chose to not disclose, and indeed fought tirelessly to conceal. Absent the "opportunity of knowing the truth", Plaintiff may pursue a claim based upon the allegation that he was deceived by misrepresentations or omissions. *Charles Hester Enters., Inc. v. Illinois Founders Ins. Co.*, 137 Ill.App.3d 84, 99 (Ill.App.Ct. 1985). Plaintiff had no such opportunity, therefore his claim should stand. *Id.*

B. DEFENDANT DID HAVE A DUTY TO DISCLOSE THE TERMS OF ITS BATTERY REPLACEMENT PROGRAM

Defendant next argues that even if it failed to disclose the material terms of its BRP, it owed Plaintiff and consumers no duty to disclose same. However, where a defendant contributes to and intentionally fails to correct plaintiff's misapprehension of material facts by omission, a duty to disclose will be found. *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 500, 675 N.E.2d 584, 593 (Ill. 1996), *Miller v. William Chevrolet*, 326 Ill.App.3d 642, 657, 762 N.E.2d 1, 13 (Ill.App.Ct. 2001). In the case at bar, Defendant contributed to Plaintiff's and consumers' reasonable belief that he would not incur usurious and costly fees for its BRP where it intentionally omitted, concealed and/or failed to disclose to Plaintiff and consumers the cost of its BRP, and the fact that a fee in any amount would ever be assessed. In addition to concealing and/or failing to disclose the cost and terms of its BRP, Defendant further contributed to this misapprehension, and intentionally failed to correct said misapprehension, by failing to include any of the material terms of its BRP (i.e., cost, etc.) on the websites to which it directed Plaintiff for information regarding the BRP. Those websites to which Defendant directed Plaintiff and consumers, as Defendant admits, did not contain such material terms (i.e., cost, terms, etc.) and made no mention that Plaintiff or consumers would ever incur a fee of any sort. *See* Defendant's Response to Plaintiff's Requests for Admission #14-#18, attached hereto as Exhibit B.

It is well settled law that when a seller has, without substantial investment on its part come upon material information which the buyer would find either impossible or very costly to discover himself, the seller must disclose it. *F.D.I.C. v. W.R. Grace & Co.,* 877 F.2d 614 (7th Cir. 1989). Further, a seller who knows that "some class of buyers would not buy his product if they knew it contained some component that he would normally have no duty to disclose, but fearing to lose those buyers falsely represents that the product does not contain the component, is guilty of fraud." *In Re: African-American Slave Descendants Litigation,* 471 F. 3d 754, 762 (7th Cir. 2006). Such is the case here where Defendant created, rather than merely "came to learn of", a situation in which the material terms of its BRP were concealed from the Plaintiff and consumers.

In the case of *In Re: African-American Slave Descendants Litigation*, the court ruled that a defendant commits fraud within the auspice of consumer protection laws if it knowingly and falsely represents that a condition does not exist, when in fact it does, for fear of losing customers. *Id.*

Here, Plaintiffs charge the Defendants with knowingly and intentionally omitting and/or concealing the material terms of its BRP for fear of not only losing customers, but also with the intent of attracting new customers. As the court found such actions could give rise to the level of fraud in *In Re: African-American Slave Descendants Litigation*, the same is true here.

Additionally, *F.D.I.C.* involved a claim for fraudulent concealment. *F.D.I.C.*, 877 F.2d at 616. In assessing that claim, the 7th Circuit provides the example of a homeowner who is selling his home and has knowledge that the home is infested with termites. *Id.* The seller of that home must disclose the termite infestation to the buyer. *Id.* That example, and the *F.D.I.C.* case from which it arises, closely parallel the facts of the case at hand.

In this case, Plaintiffs have alleged that Defendants had knowledge of and in fact purposefully concealed the material terms of its BRP. This is shown by Group Exhibit A, and Exhibits G, I-L, attached hereto. Because this omission and/or misrepresentation was intentionally, knowingly and purposefully carried out by Defendant, no investment on behalf of Defendant to discover same would be required - after all, it is the Defendant that created this fraud. In contrast, as argued herein, Plaintiff was in no position to discover the material terms of Defendant's BRP because not only were said terms concealed, but Defendant directed Plaintiff to other websites under the auspice that those sites contained the entirety of material terms. In fact, Plaintiff has alleged, and the email correspondence of Defendant and its placement of the relevant information on hidden websites confirms, that Defendant purposefully concealed the material terms of its BRP, thus making it impossible for Plaintiff to discover same. Defendants argue that they were entitled to stand mute, but like the homeowners' knowledge of termite infestation, Defendants in this case had a duty to disclose these hidden costs. Because this case arises from a deliberate act - the intentionally fraudulent concealment of hidden costs as opposed to mere knowledge of a defect such as termites – Defendant's duty to disclose (and liability for failure to do same) should be greater, as it surely would be if the homeowner in the example offered by the court in *FDIC* purposefully put the termites in his home prior to selling it.

Finally, the price, shipping costs, terms, etc., of the BRP are material facts where they would "result in extra costs that were effectively concealed by the [defendant]". *Chandler v. American General Finance, Inc.*, 768 N.E.2d 60 (Ill.App.1 Dist. 2002). Clearly, where Defendant's costly BRP would result in a fee equivalent to roughly 20% of the purchase price of the iPhone, Plaintiff would incur extra and substantial costs, making the concealed terms of the BRP "material facts" for purposes of pleading a claim for fraudulent concealment.[4] *Id.*

III. BREACH OF IMPLIED WARRANTIES (COUNTS III & IV)

Defendant argues in its Motion that Plaintiff cannot sustain a claim for breach of implied warranties of merchantability and fitness for a particular purpose because, Defendant alleges, Plaintiff failed to provide notice to Defendant of the breach, Plaintiff cannot establish that his iPhone was not merchantable at the time of sale, and Plaintiff cannot satisfy the particular purpose requirements. For the following reasons, these arguments are without merit and should be rejected.

A. THE NATURE OF PLAINTIFF'S CLAIM DOES NOT REQUIRE HIM TO PROVIDE DIRECT NOTICE TO THE DEFENDANT OF THE BREACH

In a claim for breach of implied warranties, there are instances where a buyer can fulfill the direct notice requirement without giving direct notice to the seller. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 494, 675 N.E. 2d 584, 590 (1990). This is one such instance.

Defendant would have this Court believe that Defendant had no notice of actions that Defendant itself purposefully and deliberately undertook. Plaintiff need not provide Defendants with prior notice of the terms of Defendant's BRP, or of Defendant's intentional concealment of same, as Defendant already had actual notice because, after all, it was the Defendants who purposefully omitted and concealed these material terms.

Even if this Court should find that Plaintiff need provide notice of the breach pursuant to 810 ILCS 5/2-607(3)(a), Plaintiff falls within an exception to the 2-607 notice requirement. An exception to the notice requirement exists where "the manufacturer is somehow apprised of the trouble with the particular product purchased by a particular buyer." *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 494 (1990). Defendant had actual knowledge of its failure to adequately disclose the terms of its BRP related to the iPhone purchased by Plaintiff in this lawsuit, because it concealed these facts from all consumers where the omission and concealment was deliberate.

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[4] Although Defendant does not argue in its Motion for Summary Judgment that the facts Plaintiff alleges they failed to disclose are not "material facts", Plaintiff addresses same herein in anticipation of this issue being raised in Defendant's Reply brief.

Defendants improperly rely on the same case, *Connick,* to support their argument that Plaintiff was required to, and failed to, provide notice of the breach to Defendants. However, in *Connick* the plaintiff did not allege that the defendant had actual knowledge of the alleged breach of the particular products purchased by the plaintiff. For that reason, the court in *Connick* held that plaintiff's allegation of actual notice was insufficient. The facts of *Connick* are easily distinguished from this case. In this case, Defendant had actual knowledge of its own omissions, as evidenced by its email correspondence, etc., with respect to the material terms of its BRP. In short, the plaintiff in *Connick* did not fall within the exception to §2-607, whereas the Plaintiff here does.

B. THE PLAINTIFF'S IPHONE WAS NOT MERCHANTABLE AT THE TIME OF SALE BECAUSE THE TERMS OF THE COSTLY BRP WERE NOT DISCLOSED TO THE PLAINTIFF, AND CAN NOT BE SAID TO HAVE REASONABLY CONFORMED TO AN ORDINARY BUYER'S EXPECTATION

Every agreement for the sale of goods includes an implied warranty of merchantability as regards fitness of goods for ordinary purpose for which they are used. *Soft Water Service, Inc., v. M. Suson Enterprises, Inc.,* 39 Ill. App.3d 1035 (1976). In the case at bar, Plaintiff purchased a cellular telephone that requires a battery for use. As argued above, the Defendant misrepresented and/or omitted the material terms of its BRP, which, had they disclosed would have informed the Plaintiff of its substantial hidden costs. These hidden costs, disclosed by the Defendant only after it came under fire from the media and consumer advocacy groups, rendered the product not merchantable. Defendant cites to the cases of *Kaczmarek v. Microsoft Corp.,* 39 F.Supp. 2d 974 (N.D. Ill. 1999) and *Haddix v. Playtex Family Prods. Corp.,* 964 F. Supp. 1242 (C.D. Ill. 1997) in support of its contention that Plaintiff cannot sustain his merchantability claim[5]. However, those cases could not differ more from the facts at hand. In each of those cases, the court based its rulings on the fact that the allegedly concealed issue was found to have been disclosed. Here, no such finding has been made – and no such finding could be made – where the Defendant directed its consumers to websites that failed to contain the relevant terms of its BRP, worked to keep the terms of its BRP a secret from consumers, and otherwise did all it could to prevent such disclosure as argued extensively above.

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[5] *Kaczmarek* was decided on the basis of a motion to dismiss, not a motion for summary judgment as is at issue in the case at bar. *39 F.Supp. 2d 974 (N.D. Ill. 1999).*

This case is more aligned with the facts of *Mandel Brothers v. Mulvey* 230 Ill.App. 588 (1924). In *Mandel Brothers* the buyer of an overcoat was induced to purchase on the sellers claim that the overcoat would wear for three years. *Id.* In fact, the overcoat became unfit for wear within 60 days. *Id.* The court ruled that these facts could sustain a claim for breach of implied warranty of merchantability. *Id.* Here, Plaintiff stands in similar shoes. Defendant, in refusing to disclose the terms of its BRP, led Plaintiff down a path of misrepresentations and omissions that concluded with the purchase of a cellular telephone that carried hidden costs equal to over 20% of its already high purchase price. Absent its threads, the overcoat became unfit for wear; absent its battery, Plaintiff's phone is unfit for use as such.

IV. BREACH OF CONTRACT AND UNJUST ENRICHMENT (COUNTS V & VI)

Defendant attacks Plaintiff's claims for breach of contract (Count V) and unjust enrichment (Count VI) on virtually the same grounds as the prior four counts, that being its frivolous claim that it made adequate disclosure of the terms of its BRP. Because Plaintiff has adequately addressed this claim at length above, he will refer this court to his argument herein in response to Defendant's Motion for Summary Judgment as to counts V and VI. In addition, for the same reasons articulated above, Plaintiff maintains that there remain material questions of fact as to whether or not Defendant engaged in an underlying "unlawful or improper conduct", i.e., fraud, consumer fraud, etc., to form the basis of a claim for unjust enrichment. Where, as demonstrated here, Plaintiff can demonstrate a basis for his claim of wrongful conduct or unjust benefit, he will have also demonstrated a basis for his claim of unjust enrichment. *Munch v. Sears Roebuck & Co.,* No. 06 C 7023, 2007 U.S. Dist. LEXIS 62897, at *22 (N.D. Ill. Aug. 27, 2007).

V. CONCLUSION

For all the reasons set forth above, Plaintiff respectfully requests that the Court deny Defendant Apple Computer, Inc.'s Motion for Summary Judgment as to each of Plaintiff's causes of action, and for such further relief as this Court deems just.

Respectfully submitted,

Jose Trujillo, individually and on behalf of all others similarly situated,

Dated: July 2, 2008

By: ______/s/ James Rowe_______

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